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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-231

AMERICAN POLLUTION PREVENTION COMPANY, INC.,

Respondent,

vs.

NATIONAL ALFALFA DEHYDRATING AND MILLING COMPANY,

Petitioner.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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JURISDICTION

Petitioner asserts that "judgment" of the Minnesota Supreme Court was entered May 23, 1975. That is in fact the date the clerk of the Supreme Court of Minnesota filed the Opinion of that Court affirming the order of the trial court, denying petitioner's motion to dismiss for want of personal jurisdiction. The only "judgment" the Court has entered is that taxing appeal costs against petitioner. There has been no trial of this action and no decision on the merits. Thus, a question is presented, whether the order of the Supreme Court of Minnesota is a "[f]inal" judgment

or decree within the meaning of 28 U.S.C. §1257. We are prepared to agree with petitioner that it is. See *Mercantile National Bank at Dallas v. Langdeau,* 371 U.S. 555 (1963). Under Minnesota law, petitioner is now barred from raising the question of personal jurisdiction again in this litigation. The decision of the Supreme Court of Minnesota is a final judgment on that question.[1]

QUESTION PRESENTED

The question presented is whether the record discloses sufficient contacts between petitioner and the State of Minnesota to warrant exercise of personal jurisdiction by that State.

STATEMENT OF THE CASE

The record that forms the basis for the decision of the Minnesota courts to exercise personal jurisdiction over petitioner consists primarily of the uncontroverted affidavit of A. P. McMaster (Appendix H, A-29 - A-33). That affidavit establishes the following contacts between petitioner and the State of Minnesota.

Respondent is a Minneapolis-based company. Officials of petitioner twice came to Minneapolis to discuss the underlying transaction and other business relationships in 1973. In addition, numerous telephone conversations relating to

[1]Petitioner included with its brief copies of the original complaint and answer and counterclaim, but not of the amended complaint and answer and counterclaim. We have included the latter as an appendix to this brief. Comparison of the two answers establishes that petitioner asserted the defense of lack of personal jurisdiction in its original answer, but not in the second. This change, which occurred after the decision herein of the Supreme Court of Minnesota, suggests petitioner has waived the defense it seeks here to uphold. Thus, jurisdiction is doubtful, even though we agree the *Langdeau* doctrine otherwise applies.

the underlying transaction occurred between Minnesota and Nebraska in 1973 and 1974. In a related transaction, petitioner had already been paying respondent *in Minnesota* for the purchase of cattle. In the transaction now in dispute once again payment was "to be made in Minnesota."[2] (A-30)

Petitioner has had "close ties" (A-30) to the State of Minnesota for at least five years. Approximately ten percent of its sales occur in Minnesota. Petitioner is an agribusiness company, primarily in the feed industry; "it is virtually impossible to conduct a national feed business without having substantial Minnesota contacts." (A-31) A Minnesota corporation, closely affiliated with respondent, handled all export marketing for petitioner for two years and has discussed handling *all* marketing for petitioner.[3] That same Minnesota company has had numerous, repeated contacts with petitioner and was involved in a joint venture with it for approximately 18 months. Petitioner sends representatives "frequently" (A-31) to Minnesota to conduct its business there, sells directly to several Minnesota concerns, and advertises in Minnesota publications.

Aside from its attempts to minimize its Minnesota contacts, petitioner's Statement of Case is reasonably accurate. It does contain several factual assertions unsupported by the record (see, e.g., the last three sentences of the second

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[2]While petitioner has never denied the affidavit's assertion, it now, for the first time, seeks to persuade a court that Nebraska law "requires" (Brief, p. 5) payment to be made in Nebraska. All the Nebraska statute in question deals with is the time and place for payment in the event the parties have not "otherwise agreed." (Brief, p. 3) Here, the parties did otherwise agree, and payment was "to be made in Minnesota."

[3]Page A-30 of petitioner's brief contains a typographical error in line 10, where the word "with" should read "all."

beginning paragraph of page 5 of petitioner's brief). It also misstates the nature of petitioner's counterclaim, suggesting that petitioner was harmed by an alleged failure to deliver in a timely fashion (p. 5). In fact, petitioner sought to avoid delivery and prevented earlier delivery; its counterclaim relates only to alleged failure to pay for feed at an earlier date (A-21 and A-23). Those earlier dealings between the parties are additional indication of petitioner's substantial Minnesota contacts.

ARGUMENT

Petitioner does not suggest any language in Rule 19 of the Supreme Court Rules that support its petition. It does not even assert that there are "special and important reasons" for the Court to grant its petition for review. This case is hardly one involving a federal question of substance not heretofore determined by this Court. Neither, we urge, can this case be said to be one that the Supreme Court of Minnesota has decided "in a way probably not in accord with applicable decisions of this court." Rule 19.1(b). Rather, this is only one of a large volume of cases applying well-recognized principles to specific factual contexts. See, e.g., *Hunt v. Nevada State Bank*, 172 N.W.2d 292 (Minn. 1969), cert. denied sub nom. *Burke v. Hunt*, 397 U.S. 1010 (1970).

As the Supreme Court of Minnesota expressed it, the unopposed affidavit of Mr. McMaster indicates a

> substantial and continuing business carried on by defendant in this state . . . . [Petitioner] has taken advantage of the protection of Minnesota law and could reasonably anticipate that its activities would have economic as well as legal consequence in Minnesota . . . .

> Finally, the dollar amount of the contract [approximately $1,600,000 (A-2)] and its potential economic impact indicate a substantial Minnesota interest in protecting the rights of plaintiff, whose main offices are here. (A-6-7)

Petitioner's Minnesota contacts established in this record (even though this record is not as developed as one would expect of a case presented to this Court for review) are substantially greater than the California contacts of defendant in *McGee v. International Life Insurance Co.*, 355 U.S. 220 (1957). Further, there are numerous activities, both in the underlying transaction (including specifically by way of counterclaim in this litigation) and in its national feed business,

> by which the defendant purposefully avails itself of the privilege of conducting activities within the former state, thus invoking the benefits and protections of its laws. *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

The agreement underlying this litigation involves a major interstate transaction, one that is an integral part of our "national economy." *McGee*, 355 U.S. at 222. Whenever a company that denominates itself "National" Alfalfa Dehydrating and Milling Company enters into such a million-dollar-plus transaction with a Minnesota company, it must expect significant economic and legal consequences in Minnesota. For the Minnesota courts to exercise personal jurisdiction under these circumstances does not, we submit, offend "traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

CONCLUSION

For the reasons set forth hereinabove, the petition should be denied.

Respectfully submitted,

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APPENDIX

STATE OF MINNESOTA
County of Hennepin

DISTRICT COURT
Fourth Judicial District

AMERICAN POLLUTION PREVENTION COMPANY, INC.,

Plaintiff,

vs.

NATIONAL ALFALFA DEHYDRATING AND MILLING COMPANY,

Defendant.

AMENDED COMPLAINT
File No. 703261

Plaintiff for its complaint against defendant states:

1. Plaintiff is a Delaware corporation, with its principal place of business in Minnesota.

2. Defendant is a Delaware corporation, with its principal place of business in Kansas, but does business in Minnesota within the meaning of the Minnesota Statutes conferring personal jurisdiction.

3. On or about January 4, 1974, defendant entered into an Amended Purchase Agreement in the form attached hereto as Exhibit A with plaintiff.

4. Despite and in violation of the terms of that Amended Purchase Agreement, defendant has failed and refused to purchase any of the cattle described therein.

5. As a result of defendant's failure and refusal, plaintiff has suffered direct damages in the amount of $743,694, plus interest.

6. At the time it entered into the Amended Purchase Agreement, defendant knew plaintiff was in a precarious financial condition. Both then and when it refused to perform pursuant to the agreement, defendant knew that its failure to perform would make it impossible for plaintiff to continue its banking relationships or to obtain financing from any source, would cause plaintiff to become insolvent or nearly so, and would thus cause substantial damage to plaintiff's business reputation.

7. Defendant's deliberate refusal to perform did in fact lead to the results described in paragraph 6, thus causing consequential damages to plaintiff in excess of $500,000.

WHEREFORE, plaintiff demands judgment against defendant in the amount of $1,243,694, plus interest, costs, disbursements, and attorneys' fees.

MASLON KAPLAN EDELMAN BORMAN BRAND & McNULTY
By /s/ CHARLES QUAINTANCE, JR.
1800 Midwest Plaza
Minneapolis, Minnesota 55402
(612) 339-8015
Attorneys for Plaintiff

EXHIBIT A

AMENDED PURCHASE AGREEMENT

THIS AGREEMENT, EXECUTED in Atkinson, Nebraska, this 4th day of January, 1974 by and between AMERICAN POLLUTION PREVENTION COMPANY, INC., (hereinafter referred to as "Seller"), and P & P FARM SUPPLY, a division of NATIONAL ALFALFA DEHYDRATING AND MILLING COMPANY, (hereinafter referred to as "Buyer"),

WITNESSETH:

WHEREAS, the parties hereto have heretofore entered into agreements relating to the purchase and sale of certain cattle, and,

WHEREAS, the parties are desirous of restating, with respect to the executory part of those prior agreements, certain of the terms and conditions of such agreements, as set forth hereinafter, and,

WHEREAS, Seller is the owner of 2300 Okie Feeder Steers, more or less, presently located at Onida, South Dakota and Norfolk, Nebraska, and 1500 head of Okie Feeder Steers, presently located at Norfolk, Nebraska, (hereinafter sometimes collectively referred to as the "Herd"), and is desirous of selling the Herd to Buyer, and Buyer is desirous of purchasing the Herd from Seller on the terms and conditions hereinafter set forth.

NOW, THEREFORE, in consideration of the mutual agreements and undertakings set forth hereinafter, and notwithstanding the provisions of any earlier agreement, and upon the terms and conditions set forth below, the parties hereto agree as follows:

1. Seller shall sell to Buyer, 2300 Feeder Steers, more or less, grading at least 80% choice, said steers to be delivered, F.O.B., to Buyer's feedlot in Atkinson, Nebraska, delivery to commence on or about December 31, 1973, and to terminate on or about January 25, 1974. Buyer shall not be obligated to accept any animals weighing less than 650 pounds after shrink.

2. The purchase price to be paid by Buyer to Seller with respect to the Feeder Steers described in Paragraph 1, shall be $66.00 per hundredweight, off-truck-weight when shipped from Onida, and on-truck-weight less 3% when shipped from Norfolk, adjusted however as follows:

a. The aforesaid $66.00 per hundredweight is based upon average pay weight of 650 pounds per animal.

b. The purchase price per hundredweight shall decrease by $.02 per pound of average weight per animal in excesss of 650 pounds.

c. For every average pound less than the aforesaid 650-pound average per animal, the purchase price per hundredweight hereof shall increase $.02 per pound. (This adjustment being referred to in the industry as a $.02 slide, up or down).

3. The off-truck-weight referred to above shall be determined upon scales, the accuracy of which have been certified to by the State of Nebraska. Said Certification to be currently in effect.

4. Seller shall sell to Buyer, 1500 Okie Feeder Steers, more or less, grading at least 80% choice, said steers to be

delivered to Buyer's feedlot in Atkinson, Nebraska, said delivery to be completed on or about March 4, 1974. Buyer shall not be obligated to accept any animals weighing less than 650 pounds.

5. The purchase price to be paid by Buyer to Seller with respect to the Okie Feeder Steers described in Paragraph 4 hereof, shall be $69.00 per hundredweight, based on weight at the time of loading said steers at Norfolk, Nebraska, adjusted, however, as follows:

a. The aforesaid $69.00 per hundredweight is based upon average pay weight of 650 pounds per animal.

b. The purchase price per hundredweight shall decrease by $.02 per pound of average weight per animal in excess of 650 pounds.

c. For every average pound less than the aforesaid 650-pound average weight per animal, the purchase price per hundredweight shall increase $.02 per pound. (This adjustment being referred to in the industry as a $.02 slide, up or down).

d. The computed total purchase weight shall be decreased by 3% for shrink allowance to Buyer.

6. With respect to the portion of the Herd described in paragraph 1 above, Seller shall invoice Buyer per Buyer's scale weight tickets and subject to the contingency hereinafter stated, Buyer agrees to pay said invoice on or before January 25, 1974. With respect to that portion of the Herd described in Paragraph 4, Seller shall invoice buyer per the Fore Quarters Feed Lot, Norfolk, Nebraska,

scale weight tickets. Subject to the contingency hereinafter stated, Buyer agrees to pay said invoice upon receipt thereof. In the event that any of the payments due the Seller are not paid when due, the same shall draw interest at the rate of nine per centum per annum from due date until paid.

In the event that Buyer has been unable to sell or re-sell any portion of either of the lots of cattle herein to a Feeder or Investor for the purpose of feeding the same to market weights, prior to the due dates for payment by Buyer to Seller, the Buyer shall have the right to postpone the payments due to Seller, in which event the Buyer shall place said lots of cattle on feed for its own account, and shall furnish all the feed and care at its own expense to grow said cattle to market weights as fat cattle, and thereafter cause the same to be marketed in the joint names of Seller and Buyer. The proceeds of the sale of such cattle shall be first applied to the payment of any sums of money due to Seller from Buyer under this agreement, and any surplus thereafter shall be paid to Buyer. In the event the proceeds of the sale of such cattle are not sufficient to pay in full the amounts due to Seller from Buyer hereunder, Buyer shall immediately pay to Seller the amount of any balance remaining due and unpaid.

With regard to any lots of cattle for which payment has been postponed, Buyer shall have the right to pay for same or any portion thereof at any time, and to receive title to such parts as are paid for.

7. The parties hereto expressly agree that until such time as payment of the appropriate invoice has been made in full, by Buyer, title to the Herd of any part thereof, which are the subject of any unpaid invoice, remains en-

tirely with Seller and Seller shall have no obligation to present any bill of sale, brand release, or other document evidencing a transfer of title to the Herd, or the appropriate part thereof, until such payment has been received by Seller.

8. Buyer agrees that so long as any amount of any invoice, including interest thereon, if any, shall remain unpaid, Buyer shall agree to allow any field warehousing company, of Seller's choosing, to come upon Buyer's feedlots for the purpose of inspecting the Herd and issuing appropriate warehouse receipts thereon. Buyer shall use its best efforts and shall give its fullest cooperation to such warehousing company to assist them in the conduct of their employment. All costs and expenses to be paid to said field warehousing company shall be solely the obligation of the Seller herein.

9. If payment to Seller is postponed by Buyer, Buyer agrees that Buyer shall feed the Herd, commencing on delivery at its feedlot in accordance with the highest standards generally applied throughout the industry for finishing the Herd to slaughter weight, taking into consideration the type and weight make-up of the Herd. This obligation shall be solely at Buyer's expense. Buyer agrees that no lien, whether statutory or otherwise, shall be placed upon the Herd as a result of its obligations hereunder. Buyer further agrees to indemnify and hold Seller harmless against any loss, cost, or expense whatsoever, on account of any such lien.

10. Seller and Buyer agree that delivery of the 2300 cattle as referred to in Item 1, page 1, will be in accordance with the State of Nebraska Department of Agriculture let-

ter dated December 21, 1973 (copy of same attached hereto). Delivery of the 1500 cattle referred to in Item 4, page 1, will meet all conditions of the State of Nebraska Department of Agriculture prior to shipment. Clearance for shipment will be covered by a letter from said agency and will not adversely affect status of the present quarantine at P&P in Atkinson, and should P&P not be under quarantine, such delivery would not cause P&P to be placed back in quarantine.

11. Buyer shall be notified in advance of time of loading of any cattle identified to this agreement through the yards of facilities at Norfolk, Nebraska, and shall have the right to have a representative present to inspect said cattle and who shall have the right to reject any cattle not meeting the standards of this agreement or any obviously unhealthy cattle.

12. Buyer has previously purchased and paid for lots of cattle from Seller, other than the cattle described in this agreement, and has given Seller promissory notes, security agreements, and financing statements covering such purchases. Seller agrees to immediately return to Buyer such paid and cancelled promissory notes and security agreements and releases of such financing statements. Buyer may withhold payments due to Seller hereunder until such documents are furnished.

13. Nothing in this agreement contained shall be deemed or construed to place Buyer and Seller in the relationship of partners and at all times, their relationship shall be that of Buyer and Seller only.

14. This agreement shall be binding upon and inure

to the benefit of the parties hereto and their respective successors and assigns.

15. This agreement shall be construed according to the laws of Nebraska.

IN WITNESS WHEREOF, the parties have hereunto set their hands as of the day and year first above written.

AMERICAN POLLUTION PREVENTION COMPANY, INC.
By: /s/ A. P. McMASTER
Its Vice President
P & P FARM SUPPLY, a Division of National Alfalfa Dehydrating and Milling Company,
By: /s/ LOWELL CREACH
Its Vice Pres.

The undersigned does hereby assign all of its right, title and interest in the foregoing Agreement to I. S. Joseph Company.

AMERICAN POLLUTION PREVENTION COMPANY, INC.
By: /s/ DANA X. MARSHALL
Its Secretary, Treasurer

The undersigned does hereby waive the assignment to it of AMERICAN POLLUTION PREVENTION COMPANY, INC.'s right, title and interest in the foregoing Agreement.

I. S. JOSEPH COMPANY, INC.
By: /s/ ROBERT D. ANDERSON
Its Vice President

April 12, 1974.

A-10

DEPARTMENT OF AGRICULTURE

December 21, 1973

Mr. Lowell Creach
P&P Feedlot
P. O. Box 86
Atkinson, Nebraska 68713

Dear Mr. Creach:

This letter is in regard to our telephone conversation on December 21, 1973.

After consulting wihh Mr. Glen Kreuscher, Nebraska Director of Agriculture and Mr. Robert Ensz, Attorney for Nebraska Department of Agriculture, the decision was reached with Mr. Kreuscher and Mr. Ensz in agreement, that cattle could move from Fore-Quarters Feedlot at Norfolk to the P&P West Feedlot at Atkinson with the following stipulations required to meet quarantine requirements:

> All cattle in question are to be dipped in an approved dip under regulatory supervision. After the initial dipping, they are to be held in strict isolation from other cattle 10 to 14 days and receive the second supervised dipping at the end of this time. The first dipping is to be completed at the Fore-Quarters facilities and the second dipping may be at Fore Quarters or at P&P yards. By following this procedure, there will be no violation of the quarantines now in effect at either of the aforementioned premises.

Please inform this office previous to the time of dipping

so the necessary supervision can be given to charging the vat, etc.

Sincerely,

NEBRASKA BUREAU OF ANIMAL INDUSTRY
BURRELL D. SPAHR, DVM
Ass't. State Veterinarian

BDS:fs
cc. Clark Collins
Dr. R. Dougherty
Ron Krutzinger
Glenn Kreuscher

(Title of Cause.)

ANSWER AND COUNTERCLAIM TO AMENDED COMPLAINT

File No. 703261

Defendant, for its Answer to Plaintiff's Amended Complaint,

I.

Admits paragraphs 1 and 3 of Plaintiff's Amended Complaint and that portion of paragraph 2 alleging that defendant is a Delaware corporation with its principal place of business in the State of Kansas.

II.

Specifically denies that portion of paragraph 2, supra, alleging that defendant does business within Minnesota within the meaning of Minnesota Statutes conferring personal jurisdiction.

III.

Denies paragraphs 4, 5, 6 and 7 of Plaintiff's Amended Complaint.

IV.

Alleges further that the agreement specifically provided for delivery of the first 2,300 steers by January 25, 1974, but that plaintiff breached said agreement by failing and refusing to deliver any of said cattle within the time specified in the agreement which constitutes a material breach authorizing defendant to rescind the agreement.

V.

Alleges that paragraphs 6 and 7 of Plaintiff's Amended Complaint fail to state a cause of action upon which relief can be granted under the Uniform Commercial Code, the governing statute herein.

COUNTERCLAIM

For its Counterclaim against the plaintiff defendant states as follows:

I.

Plaintiff is indebted to the defendant in the sum of Nine Thousand Six Hundred Ninety Dollars and Six Cents ($9,690.06) in accordance with its contracts as set forth in Exhibit A attached hereto.

WHEREFORE the defendant prays for judgment against the plaintiff in the sum of Nine Thousand Six Hundred

Ninety Dollars and Six Cents ($9,690.06), together with its costs and disbursements herein.

/s/ GEORGE P. HOKE
Attorney for Defendant
1100 Northwestern Bank Building
Minneapolis, Minnesota 55402
332-6331/2